
Short Term Rental Litigation Update 5-1-24

1 message

CFPOA <cfpoa@connesteefalls.com>
To: admin@lookingglassrealty.com

Wed, May 1, 2024 at 9:45 AM

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We are writing with an update on the pending litigation concerning Connestee Falls. The Plaintiffs and CFPOA have agreed to conduct a mediation to seek an agreement on all disputed issues. We are hopeful that an agreement can be reached in the near future, and the parties may exchange offers in advance of mediation. Counsel are working through the selection of a mediator and scheduling of a mediation now.

All parties are represented by experienced litigators who have vast experience representing community associations. Please be wary of information you receive from those not directly involved in the case, as it is likely not based on fact or a proper understanding of the matters at issue in the case. The process of reaching a resolution—through settlement or not—may take time. Please be patient, and we will provide updates when appropriate.

Brent Ziegler, Board President
For Board of Directors

STATE OF NORTH CAROLINA

COUNTY OF TRANSYLVANIA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

24 CVS _____

Brian T. Caskey and Jennifer Caskey,
Lanny E. Byrd and Paula Byrd,
Matthew Morrow and Melissa Morrow,
Jennifer Suzanne Dellacroce and Matthew
Lewis Hooper,
M. Kevin Turner and Andrea M. McBride
Turner,
AML, LLC, a South Carolina limited liability
company,
Cabin by the Falls, LLC, a North Carolina
limited liability company,
Walter Frank, Trustee of the Walter and Mikki
Frank Family Trust dated September 20,
1991,
Amy Osterberg and Peter Hastings,
Gregory Westfall and Sheryl Myers Westfall,
Grant Alexander Perna and Michael John
Guido McDonald,
David D. Burns and Jamey B. Burns,
Twelve Star, LLC, a Florida limited liability
company,
Brian K. O'Neil and Ellen K. O'Neil,
Mickey D. Stapp and Annie Marie Stapp,
Karen A. Shields,
2829 Connestee Trail, LLC, a Louisiana
limited liability company,
Cheryl Diane Baker and David Scott Baker,
Nora Pedersen and Neil Pedersen,
Kelly J. Hunt and Jeffrey E. Korte,
352 tlvdati, LLC, a South Carolina limited
liability company,
Jack Gerzina and Cathleen Gerzina,
WBWBG, LLC, a North Carolina limited
liability company,
Samuel G. Smith and Malissa J. Smith,
Steven A. Graves and Sandra C. Graves,
Ticoa Heights, LLC, a South Carolina limited
liability company,
Rayann N. Scott and Michael A. Scott,
Jeremy Carter and Martha Carter,

COMPLAINT

(DECLARATORY JUDGMENT,
BREACH OF CONTRACT,
INTERFERENCE WITH
PROSPECTIVE CONTRACT,
NEGLIGENT
MISREPRESENTATION,
NEGLIGENCE, UNFAIR AND
DECEPTIVE TRADE PRACTICES)

**PETITION FOR WRIT OF
MANDAMUS**

M2FAS, LLC, North Carolina limited liability company,
David L. Donaldson and Susan P. Donaldson,
Millard Filmore Strunk, Jr. and Sandra
Jenkins Strunk,
Karl W. Kerzic and Vickie D. Kerzic,
Dominic J. Yannitelli and Kathryn Yannitelli,
Rebecca D. Bush,
Richard Alexander Brown and Thea Danielle
Brown,
Michael John Carney and Robin Ellice
Carney,
Telia Erin Krupnick and Timothy Joel
Krupnick,
Oliver K Investments, LLC, a Florida limited
liability company,
Gregory G. Hilton and Katherine M. Swartz,
Michael Reilly and Timothy James Reilly,
Sierra Elizabeth Caskey,
Joseph Anthony Ozog and Emily Ozog,
Christopher Margolin and Jessica Dumas,
930 MCT, LLC, North Carolina limited liability
company,
Twin Peaks, LLC, a South Carolina limited
liability company,
Robert J. Kurzreiter and Joyce A. Kurzreiter,
Trustees of the Robert J. Kurzreiter and Joyce
A. Kurzreiter Living Trust dated December 6,
2019,
Mark Codgen and Tara Codgen,
Jennifer L. O'Brien,
Martin D. Lindsay, as Trustee of the Martin D.
Lindsay Living Trust date March 21, 2018,
25 Sedi Court, LLC, a South Carolina limited
liability company,
Michael Leonard Whitaker and Shannon
Whitaker,
Yasaman Back and John Back,
Randyjackie LLC, a Georgia limited liability
company,
Amy E. Olson and Christopher Olson,
Nathaniel Zachary Payer and Sharon L. Payer,
Hal Westlake and Emily Westlake, and
Joshua Morris and Barbe Morris,

Plaintiffs,

v.

Connestee Falls Property Owners Association,
Inc.,

Defendant.

Plaintiffs bring this Complaint, alleging as follows:

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I. PURPOSE STATEMENT

Plaintiffs bring this lawsuit against Defendant regarding the Defendant's recent Board decision to ban rentals of less than 30 days in the Connestee Falls Subdivision. Never before have the many iterations of the declarations been interpreted as prohibiting rentals for a period of less than 30 days. Plaintiffs are injured parties in this arbitrary and abrupt decision. Plaintiffs seek to have the prohibition declared invalid and further seek damages resulting from the Defendant's actions.

II. PARTIES, JURISDICTION, AND VENUE

1. Plaintiffs Brian T. Caskey and Jennifer Caskey are residents of Craven County, North Carolina and are the owners of that real property known as Lot 91, Unit 22, Connestee Falls Subdivision, more particularly described in that deed recorded on March 23, 2021, in Deed Book 972, Page 737, Transylvania County Registry.

2. Plaintiffs Lanny E. Byrd and Paula Byrd are residents of Madison County, Alabama and are the owners of that real property known as Lot 32, Unit 18, Connestee Falls Subdivision, more particularly described in that deed recorded on September 23, 2019, in Deed Book 894, Page 249, Transylvania County Registry and corrected by that document recorded on October 3, 2019, in Deed Book 895, Page 775, Transylvania County Registry.

3. Plaintiffs Matthew Morrow and Melissa Morrow are residents of Mecklenburg County, North Carolina and are the owners of that real property known as Lot 9A and Lot 11, both of Unit 6, Connestee Falls Subdivision, more particularly described in that deed recorded on September 28, 2022, in Deed Book 1054, Page 645, and that deed recorded on September 28, 2022, in Deed Book 1054, Page 648, both of Transylvania County Registry.

4. Plaintiffs Jennifer Suzanne Dellacroce and Matthew Lewis Hooper are residents of Richland County, South Carolina and are the owners of that real property known as Lot 53, Unit 16, Connestee Falls Subdivision, more particularly described in that deed recorded on August 15, 2022, in Deed Book 1049, Page 343, Transylvania County Registry.

5. Plaintiffs M. Kevin Turner and Andrea M. McBride Turner are residents of Richmond County, Georgia and are the owners of that real property known as Lot 36A, Unit 28, Connestee Falls Subdivision, more particularly described in that deed recorded on May 24, 2018, in Deed Book 842, Page 625, Transylvania County Registry.

6. Plaintiff AML, LLC, a South Carolina limited liability company, is the owner of that real property known as Lot 17, Unit 10, Connestee Falls Subdivision, more particularly described in that deed recorded on August 1, 2023, in Deed Book 1087, Page 70, Transylvania County Registry.

7. Plaintiff Cabin by the Falls, LLC, a North Carolina limited liability company, is the owner of that real property known as Lot 223A, Unit 1,

Connestee Falls Subdivision, more particularly described in that deed recorded on July 11, 2023, in Deed Book 1084, Page 361, Transylvania County Registry.

8. Plaintiff Walter Frank, Trustee of the Walter and Mikki Frank Family Trust dated September 20, 1991, is a resident of Transylvania County, North Carolina and is the owner of that real property known as Lot 129, Unit 26, Connestee Falls Subdivision, more particularly described in that deed recorded on August 2, 2023, in Deed Book 1087, Page 166, Transylvania County Registry.

9. Plaintiffs Amy Osterberg and Peter Hastings are residents of Mecklenburg County, North Carolina and are the owners of that real property known as Lot 67, Unit 19, Connestee Falls Subdivision, more particularly described in that deed recorded on September 30, 2021, in Deed Book 1003, Page 659, Transylvania County Registry.

10. Plaintiffs Gregory Westfall and Sheryl Myers Westfall are residents of Beauford County, South Carolina and are the owners of that real property known as Lot 30A, Unit 18, Connestee Falls Subdivision, more particularly described in that deed recorded on October 28, 2021 in Deed Book 1008, Page 253, Transylvania County Registry.

11. Plaintiffs Grant Alexander Perna and Michael John Guido McDonald are residents of Palm Beach County, Florida and are the owners of that real property known as Lot 62A, Unit 1, Connestee Falls Subdivision, more particularly described in that deed recorded on July 24, 2023 in Deed Book 1086, Page 77, Transylvania County Registry.

12. Plaintiffs David D. Burns and Jamey B. Burns are residents of Duval County, Florida and are the owners of that real property known as Lot 92, Unit 22, Connestee Falls Subdivision, more particularly described in that deed recorded on December 10, 2020 in Deed Book 955, Page 75, Transylvania County Registry.

13. Plaintiff Twelve Star, LLC, a Florida limited liability company, is the owner of that real property known as Lot 12, Unit 30, Connestee Falls Subdivision, more particularly described in that deed recorded on October 1, 2019, in Deed Book 895, Page 419, Transylvania County Registry.

14. Plaintiffs Brian K. O'Neil and Ellen K. O'Neil are residents of Charleston County, South Carolina and are the owners of that real property known as Lot 49, Unit 11, Connestee Falls Subdivision, more particularly described in that deed recorded on March 12, 2021 in Deed Book 971, Page 173, Transylvania County Registry.

15. Plaintiffs Mickey D. Stapp and Annie Marie Stapp are residents of Columbia County, Georgia and are the owners of that real property known as Lot 24, Unit 14, Connestee Falls Subdivision, more particularly described in that deed recorded on July 17, 2020 in Deed Book 930, Page 507, Transylvania County Registry.

16. Plaintiff Karen A. Shields is a resident of St. Johns County, Florida and is the owner of that real property known as Lot 101, Unit 12, Connestee Falls Subdivision, more particularly described in that deed recorded on January 27, 2022, in Deed Book 1021, Page 251, Transylvania County Registry.

17. Plaintiff 2829 Connestee Trail, LLC, a Louisiana limited liability company is the owner of that real property known as Lot 396, Unit 2, Connestee Falls Subdivision, more particularly described in that deed recorded on October 31, 2019, in Deed Book 899, Page 447, Transylvania County Registry.

18. Plaintiffs Cheryl Diane Baker and David Scott Baker are residents of Harris County, Texas and are the owners of that real property known as Lot 11, Unit 21, Connestee Falls Subdivision, more particularly described in that deed recorded on April 8, 2022 in Deed Book 1032, Page 22, Transylvania County Registry.

19. Plaintiff Nora Pedersen is a resident of Los Angeles County, CA and is the co-owner of that real property known as Lot 59, Unit 24, Connestee Falls Subdivision, more particularly described in that deed recorded on January 15, 2021 in Deed Book 960, Page 546, Transylvania County Registry

20. Plaintiff Neil Pedersen is a resident of Chatham County, North Carolina and is the co-owner of that real property known as Lot 59, Unit 24, Connestee Falls Subdivision, more particularly described in that deed recorded on January 15, 2021 in Deed Book 960, Page 546, Transylvania County Registry.

21. Plaintiffs Kelly J. Hunt and Jeffrey E. Korte are residents of Charleston County, South Carolina and are the owners of that real property known as Lot 32A, Unit 7, Connestee Falls Subdivision, more particularly described in that deed recorded on April 12, 2023 in Deed Book 1075, Page 84, Transylvania County Registry.

22. Plaintiff 352 tlvdati, LLC a South Carolina limited liability company, is the owner of that real property known as Lot 45A, Unit 11, Connestee Falls Subdivision, more particularly described in that deed recorded on February 7, 2024 in Deed Book 1105, Page 50, Transylvania County Registry.

23. Plaintiffs Jack Gerzina and Cathleen Gerzina are residents of Charleston County, South Carolina and are the owners of that real property known as Lot 64, Unit 6, Connestee Falls Subdivision, more particularly described in that deed recorded on May 31, 2022, in Deed Book 1038, Page 134, Transylvania County Registry and corrected by that document recorded on August 2, 2023, in Deed Book 1087, Page 209, Transylvania County Registry.

24. Plaintiff WBWBG, LLC, a North Carolina limited liability company, is the owner of that real property known as Lot 266A, Unit 1, Connestee Falls Subdivision, more particularly described in that deed recorded on July 19, 2021, in Deed Book 992, Page 332, Transylvania County Registry.

25. Plaintiffs Samuel G. Smith and Malissa J. Smith are residents of Transylvania County, North Carolina and are the owners of that real property known as Lot 2, Unit 9, Connestee Falls Subdivision, more particularly described in that deed recorded on October 29, 2021 in Deed Book 1008, Page 546, Transylvania County Registry.

26. Plaintiffs Steven A. Graves and Sandra C. Graves are residents of Pasco County, Florida and are the owners of that real property known as Lot 81A, Unit 6, Connestee Falls Subdivision, more particularly described in that deed recorded on June 29, 2011 in Deed Book 578, Page 749, Transylvania County Registry.

27. Plaintiff Ticoa Heights, LLC, a South Carolina limited liability company, is the owner of that real property known as Lot 264A, Unit 1, Connestee Falls Subdivision, more particularly described in that deed recorded on November 19, 2018, in Deed Book 862, Page 834, Transylvania County Registry.

28. Plaintiffs Rayann N. Scott and Michael A. Scott are residents of Marion County, Indiana and are the owners of that real property known as Lot 30, Unit 11, Connestee Falls Subdivision, more particularly described in that deed recorded on May 27, 2022 in Deed Book 1039, Page 32, Transylvania County Registry.

29. Plaintiffs Jeremy Carter and Martha Carter are residents of Gaston County, North Carolina and are the owners of that real property known as Lots 186 and 187, Unit 9, Connestee Falls Subdivision, more particularly described in that deed recorded on August 10, 2018 in Deed Book 852, Page 210, Transylvania County Registry.

30. Plaintiff M2FAS, LLC, North Carolina limited liability company, is the owner of that real property known as Lot 53, Unit 26, Connestee Falls Subdivision, more particularly described in that deed recorded on March 16, 2022 in Deed Book 1028, Page 468, Transylvania County Registry.

31. Plaintiffs David L. Donaldson and Susan P. Donaldson are residents of Transylvania County, North Carolina and are the owners of that real property known as Lot 39 and 40A, both of Unit 7, Connestee Falls Subdivision, more particularly described in that deed recorded on November 14, 2003, in Deed Book 203, Page 816, and that deed recorded on August 22, 2011, in Deed Book 583, Page 409, both of Transylvania County Registry.

32. Plaintiffs Millard Filmore Strunk, Jr. and Sandra Jenkins Strunk are residents of Union County, North Carolina and are the owners of that real property known as Lot 32, Unit 21, Connestee Falls Subdivision, more particularly described in that deed recorded on December 21, 2022 in Deed Book 1064, Page 502, Transylvania County Registry.

33. Plaintiffs Karl W. Kerzic and Vickie D. Kerzic are residents of Columbia County, Georgia and are the owners of that real property known as Lot 40A, Unit 8, Connestee Falls Subdivision, more particularly described in that deed recorded on May 15, 2019 in Deed Book 879, Page 777, Transylvania County Registry.

34. Plaintiffs Dominic J. Yannitelli and Kathryn Yannitelli are residents of Hennepin County, Minnesota and are the owners of that real property known as Building 7 of Phase 1A of Qualla Village, Connestee Falls Subdivision, more particularly described in that deed recorded on May 12, 2023 in Deed Book 1077, Page 810, Transylvania County Registry.

35. Plaintiff Rebecca D. Bush is a resident of Transylvania County, North Carolina and is the owner of that real property known as Lot 35, Unit 3, Connestee Falls Subdivision, more particularly described in that deed recorded on February 17, 2017 in Deed Book 795, Page 35, Transylvania County Registry.

36. Plaintiffs Richard Alexander Brown and Thea Danielle Brown are residents of Cherokee County, Georgia and are the owners of that real property

known as Lot 28, Unit 18, Connestee Falls Subdivision, more particularly described in that deed recorded on November 21, 2022 in Deed Book 1061, Page 343, Transylvania County Registry.

37. Plaintiffs Michael John Carney and Robin Ellice Carney are residents of Miami-Dade County, Florida and are the owners of that real property known as Lot 153A, Unit 26, Connestee Falls Subdivision, more particularly described in that deed recorded on October 20, 2023, in Deed Book 1095, Page 84, Transylvania County Registry.

38. Plaintiffs Telia Erin Krupnick and Timothy Joel Krupnick are residents of Transylvania County, North Carolina and are the owners of that real property known as Lot 76A, Unit 7, and Lot 161, Unit 1, Connestee Falls Subdivision, more particularly described in that deed recorded on May 4, 2022, in Deed Book 1035, Page 490, and that deed recorded on August 24, 2023, in Deed Book 1087, Page 354, both of Transylvania County Registry.

39. Plaintiff Oliver K Investments, LLC, a Florida limited liability company, is the owner of that real property known as Lot 7, Unit 13, Connestee Falls Subdivision, more particularly described in that deed recorded on December 9, 2022, in Deed Book 1063, Page 124, Transylvania County Registry.

40. Plaintiffs Gregory G. Hilton and Katherine M. Swartz are residents of Richland County, South Carolina and are the owners of that real property known as Lot 139, Unit 7, Connestee Falls Subdivision, more particularly described in that deed recorded on November 12, 2021, in Deed Book 1010, Page 764, Transylvania County Registry.

41. Plaintiffs Michael Reilly and his father Timothy James Reilly are residents of Craven Count, North Carolina and are the owners of that real property known as Lot 27A, Unit 21, Connestee Falls Subdivision, more particularly described in that deed recorded on January 20, 2023, in Deed Book 1066, Page 577, Transylvania County Registry.

42. Plaintiffs Michael Reilly and his wife Sierra Elizabeth Caskey are residents of Craven Count, North Carolina and are the owners of that real property known as Lot 87, Unit 29, Connestee Falls Subdivision, more particularly described in that deed recorded on May 26, 2020, in Deed Book 922, Page 113, Transylvania County Registry.

43. Plaintiffs Joseph Anthony Ozog and Emily Ozog are residents of Mecklenburg County, North Carolina and are the owners of that real property known as Lot 24, Unit 6, Connestee Falls Subdivision, more particularly described in that deed recorded on November 4, 2022, in Deed Book 1059, Page 501, Transylvania County Registry.

44. Plaintiffs Christopher Margolin and Jessica Dumas are residents of Duval County, Florida and are the owners of that real property known as Lot 132A, Unit 7, Connestee Falls Subdivision, more particularly described in that deed recorded on June 7, 2022, in Deed Book 1040, Page 414, Transylvania County Registry.

45. Plaintiff 930 MCT, LLC, North Carolina limited liability company, is the owner of that real property known as Lot 8, Unit 7, Connestee Falls

Subdivision, more particularly described in that deed recorded on September 7, 2021, in Deed Book 1000, Page 55, Transylvania County Registry.

46. Plaintiff Twin Peaks, LLC, a South Carolina limited liability company, is the owner of that real property known as Lot 366, Unit 2, Connestee Falls Subdivision, more particularly described in that deed recorded on January 27, 2023, in Deed Book 1067, Page 157, Transylvania County Registry.

47. Plaintiffs Robert J. Kurzreiter and Joyce A. Kurzreiter, Trustees of the Robert J. Kurzreiter and Joyce A. Kurzreiter Living Trust dated December 6, 2019 are residents of Orange County, Florida and are the owners of that real property known as Lot 76A, Unit 29, Connestee Falls Subdivision, more particularly described in that deed recorded on September 29, 2023, in Deed Book 1092, Page 764, Transylvania County Registry.

48. Plaintiffs Mark Codgen and Tara Codgen are residents of Brevard County, Florida and are the owners of that real property known as Lot 132, Unit 1, Connestee Falls Subdivision, more particularly described in that deed recorded on November 5, 2021, in Deed Book 1009, Page 666, Transylvania County Registry.

49. Plaintiff Jennifer L. O'Brien is a resident of Palm Beach County, Florida and is the owner of that real property known as Lot 8, Unit 12, Connestee Falls Subdivision, more particularly described in that deed recorded on December 2, 2021, in Deed Book 1013, Page 622, Transylvania County Registry.

50. Plaintiff Martin D. Lindsay, as Trustee of the Martin D. Lindsay Living Trust date March 21, 2018 is a resident of Transylvania County, North Carolina and is the owner of that real property known as Lot 1A, Unit 28, Connestee Falls Subdivision, more particularly described in that deed recorded on April 20, 2022, in Deed Book 1033, Page 519, Transylvania County Registry.

51. Plaintiff 25 Sedi Court, LLC, a South Carolina limited liability company, is the owner of that real property known as Lot 19A, Unit 25, Connestee Falls Subdivision, more particularly described in that deed recorded on April 30, 2021, in Deed Book 979, Page 713, Transylvania County Registry.

52. Plaintiffs Michael Leonard Whitaker and Shannon Whitaker are residents of Marion County, Florida and are the owners of that real property known as Lot 11, Unit 11, Connestee Falls Subdivision, more particularly described in that deed recorded on January 12, 2022, in Deed Book 1019, Page 171, Transylvania County Registry.

53. Plaintiffs Yasaman Back and John Back are residents of Gaston County, North Carolina and are the owners of that real property known as Lot 184, Unit 9, Connestee Falls Subdivision, more particularly described in that deed recorded on December 11, 2020, in Deed Book 955, Page 256, Transylvania County Registry.

54. Plaintiff Randyjackie LLC, a Georgia limited liability company, is the owner of that real property known as Lot 89, Unit 3, Connestee Falls Subdivision, more particularly described in that deed recorded on August 15, 2016, in Deed Book 773, Page 65, Transylvania County Registry.

55. Plaintiffs Amy E. Olson and Christopher Olson are residents of Transylvania County, North Carolina and are the owners of that real property

known as Lot 50, Unit 8, Connestee Falls Subdivision, more particularly described in that deed recorded on May 28, 2021, in Deed Book 984, Page 216, Transylvania County Registry.

56. Plaintiffs Nathaniel Zachary Payer and Sharon L. Payer are residents of Charleston County, South Carolina and are the owners of that real property known as Lot 27A, Unit 25, Connestee Falls Subdivision, more particularly described in that deed recorded on May 19, 2016, in Deed Book 763, Page 583, Transylvania County Registry.

57. Plaintiffs Hal Westlake and Emily Westlake are residents of Jefferson County, Alabama and are the owners of that real property known as Lot 24A, Unit 23, Connestee Falls Subdivision, more particularly described in that deed recorded on December 8, 2022, in Deed Book 1063, Page 84, Transylvania County Registry.

58. Plaintiffs Joshua Morris and Barbe Morris are residents of Greenville County, South Carolina and are the owners of that real property known as Lot 160, Unit 1, Connestee Falls Subdivision, more particularly described in that deed recorded on April 14, 2020, in Deed Book 917, Page 33, Transylvania County Registry.

59. Collectively, hereinafter, the Plaintiffs are referred to as "**the Plaintiffs.**"

60. Defendants Connestee Falls Property Owners Association, Inc. is a North Carolina non-profit corporation doing business in Transylvania County, North Carolina ("**the Association**").

61. This Court has jurisdiction over the subject matter and the parties to this action.

62. Venue in this case is proper in Transylvania County, North Carolina pursuant to N.C. Gen. Stat. § 1-76.

II. FACTUAL BACKGROUND

63. Per that "Declaration of Restrictive Covenants Connestee Falls" dated May 25, 1971, and recorded on June 4, 1971, at Deed Book 189, Page 443, Transylvania County Registry, the Connestee Falls Development Corporation established the Connestee Falls Development ("**Connestee Falls**") ("**the Original Covenants**"). The Original Covenants are attached hereto as **Exhibit A.**

64. The Original Covenants were amended by that amendment dated August 18, 1971, and recorded on August 18, 1971, at Deed Book 190, Page 437, Transylvania County Registry, and titled "Amendment to the Declaration of Restrictive Covenants for Connestee Falls." Said amendment is attached hereto as **Exhibit B.**

65. The Original Covenants were amended by that amendment dated October 8, 1983, and recorded on October 10, 1983, concerning a prohibition on timeshares recorded at Deed Book 262, Page 304, Transylvania County Registry, and titled "Amendment to the Declaration of Restrictive Covenants, Connestee Falls." Said amendment is attached hereto as **Exhibit C.**

66. The Original Covenants were amended by that amendment dated August 13, 1983, and recorded on February 6, 1984, concerning the name change from Connestee Falls Maintenance Corporation to Connestee Falls Property Owners Association, Inc. recorded at Deed Book 265, Page 157, Transylvania County Registry, and titled "Amendment to the Declaration of Restrictive Covenants, Connestee Falls." Said amendment is attached hereto as **Exhibit D**.

67. The Original Covenants were amended by that amendment dated December 15, 1984, and recorded on December 17, 1984, concerning assessments, recorded at Deed Book 272, Page 389, Transylvania County Registry, and titled "Amendment to the Declaration of Restrictive Covenants, Connestee Falls." Said amendment is attached hereto as **Exhibit E**.

68. Per that "Amended and Restated Declaration of Restrictive Covenants Connestee Falls" dated August 9, 1986, and recorded on October 8, 1986, at Deed Book 289, Page 107, Transylvania County Registry, the Original Covenants, as amended, were fully amended and restated ("**the Restated Declaration**"). The Restated Declaration is attached hereto as **Exhibit F**.

69. On August 30, 1989, an amendment dated August 12, 1989, was put of record entitled "Amendment to the Declaration of Covenants, Conditions and Restrictions and the By-Laws of Connestee Falls Property Owners Association, Inc." at Deed Book 320, Page 189, Transylvania County Registry, which appears to amend, in part, the Restated Declaration. Said amendment is attached hereto as **Exhibit G**.

70. On August 13, 1992, an amendment dated August 8, 1992, was put of record entitled "Amendment to the Declaration of Covenants, Conditions and Restrictions and the By-Laws of Connestee Falls Property Owners Association, Inc." at Deed Book 354, Page 2, Transylvania County Registry, which appears to amend, in part, the Restated Declaration. Said amendment is attached hereto as **Exhibit H**.

71. Per that "Second Restatement of Declaration of Restrictive Covenants for Connestee Falls" dated February 12, 1997, and recorded on March 5, 1997, at Deed Book 413, Page 30, Transylvania County Registry, the Restated Declaration were fully amended and restated ("**the Second Restatement**"). The Second Restatement is attached hereto as **Exhibit I**.

72. The Second Restatement states that amendments were passed by the Association on August 6, 1988 "which the Association inadvertently neglected to record" and said amendments were incorporated into the Second Restatement.

73. Upon information and belief, the members of the Association voted on August 7, 1999, to fully amend and restate the Second Restatement by that "Third Restatement of Declaration of Restrictive Covenants for Connestee Falls" ("**the Third Restatement**"). The Third Restatement is attached hereto as **Exhibit J**.

74. The Third Restatement recites the following regarding the Association vote to adopt the Third Restatement:

WHEREAS, such an affirmative vote was made by a majority of the votes entitled to be cast by members present or represented by proxy at a duly called meeting for that purpose on August 7, 1999;
NOW, THEREFORE, the Association does hereby revoke and replace all prior declarations of restrictive covenants, and amendments thereto, except to the extent incorporated herein, with this Third Restatement of Declaration of Restrictive Covenants for Connestee Falls.

75. For unknown reasons, the Third Restatement was never recorded with the Transylvania County Register of Deeds.

76. Per that "Fourth Restatement of Declaration of Restrictive Covenants for Connestee Falls" dated August 26, 2009, and recorded September 1, 2009, at Deed Book 512, Page 224, Transylvania County Registry all prior covenants and declarations were fully amended and restated ("**the Fourth Restatement**"). The Fourth Restatement is attached hereto as **Exhibit K**.

77. The Fourth Restatement does not reference the Third Restatement other than by being titled sequentially.

78. The Fourth Restatement is the first time substantial leasing provisions are added to the covenants.

79. Per that "Fifth Restatement of Declaration of Restrictive Covenants for Connestee Falls" dated September 15, 2016, and recorded on September 30, 2016, at Deed Book 779, Page 314, Transylvania County Registry, the Fourth Restatement was fully amended and restated ("**the Fifth Restatement**"). The Fifth Restatement is attached hereto as **Exhibit L**.

80. Upon information and belief, the members of the Association voted on August 5, 2017, to fully amend and restate the Fifth Restatement by that "Sixth Restatement of Declaration of Restrictive Covenants for Connestee Falls" ("**the Sixth Restatement**"). The Sixth Restatement is attached hereto as **Exhibit M**.

81. The Sixth Restatement recites the following regarding the Association vote to adopt the Sixth Restatement:

WHEREAS, such an affirmative vote was made by a majority of the votes by Voting Members in good standing present or represented by proxy at a duly called meeting for that purpose on August 5, 2017;

NOW, THEREFORE, the Association does hereby revoke and replace all prior declarations of restrictive covenants, and amendments thereto, except to the extent incorporated herein, with this Fifth Restatement of Declaration of Restrictive Covenants for Connestee Falls.

82. Following the August 5, 2017 Association meeting, the Connestee Falls Property Owners Association Board of Directors ("**the Board**") issued a statement dated August 11, 2017, responding to a question regarding the validity of the Association vote to fully amend and replace the Fifth Restatement with the Sixth Restatement and stated that the vote was in "full compliance with our governing documents and with applicable state law" and makes reference to an "attorneys' opinion" regarding the same available for review upon request ("**the**

Board's August 11, 2017 Communication"). The Board's August 11, 2017 Communication is attached hereto as **Exhibit N**.

83. In addition, the August 5, 2017 minutes of the Association's Annual meeting state that the Sixth Restatement "was approved by a vote of: For = 539 (76%) and Against = 169 (24%)" ("**the August 5, 2017 Association Minutes**"). The August 5, 2017 Association Minutes are attached hereto as **Exhibit O**.

84. For unknown reasons, the Sixth Restatement was never recorded with the Transylvania County Register of Deeds.

85. Per the Original Covenants, at the founding of Connestee Falls over 50 years ago, there were no restrictions on rentals.

86. Since then, it has been common practice for owners to rent properties for terms less than 30 days.

87. Rentals were not meaningfully addressed until the Fourth Restatement was adopted in 2009.

88. The Fourth Restatement states the following regarding rentals:

**ARTICLE XVIII
RENTING OR LEASING OF LOTS**

In order (i) to protect the equity of the individual property owners in the Association, (ii) to carry out the purpose for which the Community was formed by preserving the character of the Community as a residential community of owner-occupied homes and by preventing the Community from assuming the character of a renter-occupied apartment complex, and (iii) to comply with the eligibility requirements for financing in the secondary mortgage market in so far as such criteria provide that the Community shall be substantially owner-occupied, Lots may be leased only in their entirety; no fraction or portion may be leased. No transient tenants shall be permitted. No lots may be subleased.

"Leasing" for purposes of this Declaration is defined as regular occupancy of a Lot by any person other than the Owner, for which the Owner receives any consideration or benefit, including a fee, exchange, service, gratuity or emolument. Occupancy of a residence by a "guest" shall be deemed a lease if the Owner is not present at the residence and the "guest" is deemed a "tenant" and is liable for and required to pay tenant fees. Even if the owner is present, any "guest" who remains more than thirty (30) days is also deemed to be a tenant and is liable for and required to pay tenant fees.

All tenants are required to pay Tenant Fees as determined and set from time to time by the Board of Directors. These tenant fees give tenants access to all amenities as if they were owner members at Connestee Falls. If the tenant does not pay Tenant Fees, then the Owner of the Lot is responsible and those fees will be assessed against the Owner.

All leases and lessees are subject to the provisions of the Declaration, Bylaws, and Rules and Regulations. The Lot Owner shall make available to the tenant copies of the Declaration, Bylaws, and Rules and Regulations.

Any lease of a Lot in the Community shall be deemed to contain the provisions of the form lease attached as Exhibit "A" to the Declaration, whether or not expressly therein stated, and each Owner covenants and agrees that if such language is not incorporated into a lease document it shall be deemed to be so incorporated by the existence of this covenant on the Lot. Any lessee, by occupancy in a Lot, agrees to the applicability of this covenant and incorporation of those provisions into the lease:

All Lot Owners shall register any and all changes in the status of a rental/leased lot with the Association, including but not limited to, vacancies, the renewal of leases and new tenants, within fourteen (14) days. All Lot Owners that are currently leasing their lot at the time of recording this amendment shall register information regarding a rental/leased lot with the Association within fourteen (14) days of the recording of this Amendment with the Transylvania County Registry of Deeds. In order to properly register a rental/leased lot with the Association, the Lot Owner of a rental/leased lot must provide the Association, through the Board of Directors, or their designated representative, the name(s) of the tenants in the rental/leased lot, a telephone number by which the tenant(s) may be contacted by the Association if the need arises and the term (duration) of the lease.

The failure of any Lot Owner to comply with this section shall be considered a violation of the Declaration. The Association may, after providing the Lot Owner with notice and opportunity to be heard, impose fines up to one hundred dollars (\$100.00) a day pursuant to N.C.G.S. 47F-3-107.1 for such a violation.

89. The Fourth Restatement does not prohibit rentals of less than 30 days.

90. Rentals were again addressed in the Fifth Restatement.

91. Leading up to the Association vote on the Fifth Restatement, the May 18, 2016 Board minutes state that the rental "issue" will not be addressed in the declaration amendment and that further study is needed, thus indicating that the Fifth Restatement would not disturb the status quo of allowing short terms rentals ("**STRs**"):

We are not burying this issue. We are bringing it to the light of day. We are not making a decision on rentals—you the members will do that. Because of further study, this particular item will not be ready for inclusion with the other items scheduled to go to you for vote in July. You deserve to have all the facts possible with a recommendation that serves both the individual property owner and Conneestee as a whole.

("the May 18, 2016 Board Minutes"). The May 18, 2016 Board Minutes are attached hereto as **Exhibit P**.

92. In fact, the Fifth Restatement leasing provision is largely unchanged from the Fourth Restatement leasing provision, only stylistic changes were made:

**ARTICLE XVIII
RENTING OR LEASING OF LOTS**

- A. In order (a) to protect the equity of the Owners in the Association, (b) to carry out the purpose for which the Community was formed by preserving the character of the Community as a residential community of Owner-occupied homes and by preventing the Community from assuming the character of a renter-occupied apartment complex, and (c) to comply with the eligibility requirements for financing in the secondary mortgage market in so far as such criteria provide that the Community shall be substantially Owner-occupied, Lots may be leased only in their entirety; no fraction or portion may be leased. No transient Tenants shall be permitted. No Lots may be subleased.**
- B. Occupancy of a residence by a Guest shall be deemed a lease if the Owner is not present at the residence and the Guest is deemed a Tenant and is liable for and required to pay Tenant fees. Even if the Owner is present, any Guest who remains more than thirty (30) days may be deemed to be a Tenant, and in which case is liable for and required to pay Tenant fees.**
- C. All Tenants are required to pay Tenant fees as determined and set from time to time by the Board. These Tenant fees give Tenants access to all Amenities as if they were Members. If the Tenant does not pay Tenant fees, then the Owner is responsible and those fees will be assessed against the Owner.**
- D. All leases and lessees are subject to the provisions of the Declaration, Bylaws, and Rules and Regulations. The Owner shall make available to the Tenant copies of the Declaration, Bylaws, and Rules and Regulations.**
- E. Any lease of a Lot in the Community shall be deemed to contain the provisions of the form lease attached as Exhibit "A" to the Declaration, whether or not expressly therein stated, and each Owner covenants and agrees that if such language is not incorporated into a lease document it shall be deemed to be so incorporated by the existence of this covenant on the Lot. Any lessee, by occupancy in a Lot, agrees to the applicability of this covenant and incorporation of those provisions into the lease.**
- F. All Owners shall register any and all changes in the status of a rental/leased Lot with the Association, including but not limited to, vacancies, the renewal of leases and new Tenants, within fourteen (14) days. All Owners who lease their Lot(s) at the time of recording this amendment shall register information regarding each Lot with the Association within fourteen (14) days of the recording of this Amendment with the Transylvania County Registry of Deeds. In order to properly register a rental/leased Lot with the Association, the Owner of a rental/leased Lot must provide the Association, through the Board, or their designated representative, the name(s) of the Tenants in the rental/leased Lot, a telephone number by which the Tenant(s) may be contacted by the Association if the need arises and the term of the lease.**
- G. The failure of any Owner to comply with this section shall be considered a violation of the Declaration. The Association may, after providing the Owner with notice and opportunity to be heard, impose fines up to one hundred dollars (\$100.00) a day pursuant to NCGS 47F-3-107.1 for such a violation.**

93. After the Fifth Restatement was adopted by the Association members in the Summer of 2016, the Board, at their January 11, 2017 meeting, noted ongoing challenges regarding rentals and their inability to legally restrict rentals:

Rentals – Essentially, we are doing all we can to control the rentals [sic] situation through existing procedures and the Rules and Regulations. Nonetheless, there is significant support for tightening the controls over rental properties. Advice from our attorney having been considered, **CFPOA has limited options**. The Board has the intention, however, of attempting a modification when the Declaration of Restrictive Covenants is next amended.

(“**the January 11, 2017 Board Minutes**”) (emphasis added). The January 11, 2017 Board Minutes are attached hereto as **Exhibit Q**.

94. As the January 11, 2017 Board Minutes reflect, the Fifth Restatement does not restrict STRs.

95. Also in January of 2017, after the Fifth Restatement had been adopted and before the Sixth Restatement had been adopted, the Association changed the Tenant/Guest Registration form, and continued to facilitate STRs in Connestee Falls. The **January 25, 2017 Board Minutes** are attached hereto as **Exhibit R**.

96. The Board again expresses its inability to restrict rentals any further under the Fifth Restatement as reflected in the minutes of the **May 3, 2017** Board meeting (attached hereto as **Exhibit S**):

Rentals Issues – 80%: The rentals task force report has been accepted, but there are still concerns that our Declaration’s intent is not being met. The Board concurs, but **we are constrained by statutes/common law** according to our attorney. Nonetheless, we intend to present a proposed Declaration amendment (presently under attorney review) that will clarify terms related to rentals.

(emphasis added)

97. When the Board was ready to put forward an amendment that addressed rentals it directed the preparation of the Sixth Restatement which the Board explained codified the current practice of allowing rentals less than 30 days, as seen in the explanation of the amendment provided in the Board’s June 23, 2017 minutes (“**the June 23, 2017 Board Minutes**”). The June 23, 2017 Board Minutes are attached here as **Exhibit T**.

98. The June 23, 2017 Board Minutes state that removing the phrase “transient Tenants” and adding “All leases shall be for a term of no fewer than two (2) consecutive nights.” provides the clarity needed to maintain and enforce the declarations.

99. The Board also released a July 10, 2017 statement explaining that the proposed amendment (the Sixth Restatement) does not address all rental

issues (“**the July 10, 2017 Board Statement**”). The July 10, 2017 Board Statement is attached hereto as **Exhibit U**.

100. The July 10, 2017 Board Statement makes clear that the Sixth Restatement is clarifying the vagueness of the word transient and reassures Association members that “As with all rentals, short term guests must be registered with our Administration office”, a policy and practice already utilized under the Fifth Restatement and Fourth Restatement.

101. Before the vote on the Sixth Restatement, the July 19, 2017 Board minutes include the Association President’s statement regarding the **intent** of the proposed amendment – to clarify word “transient” and that from 1971 until the Fourth Restatement the “Declaration contained no provision or control on rentals.” The President again states that the amendment is not intended to “address various other concerns by some members on the subject of rentals.”:

President’s Report and Comments – Carl Burkhart

Mr. Burkhart read the following statement on behalf of the Board of Directors: There has been concern expressed by some in the community regarding the current ballot covering a proposed amendment to Article XVIII of the Declaration of Restrictive Covenants. **Since this Article was introduced into the Declaration eight years ago, there has been confusion over the meaning of the word ‘transient.’ We have acted in good faith in an attempt to state the intent of the provision regarding transients, using language with greater clarity and enforceability.** Our proposal was based on the advice of the lawyer who has represented our community for many years. I would like to point out that from the inception of the community in 1971 until only eight years ago, the Declaration contained no provision or control on rentals such as is now contained in Article XVIII. In the proposed amendment, we did not intend to address various other concerns by some members on the subject of rentals. We look forward to the results of the current vote as an indication of the will of the community. Regardless of the outcome, members of this Board who will carry on after August 5th are committed to convening discussion groups that may be desired in order to address issues concerning rental properties.

(“**the July 19, 2017 Board Minutes**”)(emphasis added). The July 19, 2017 Board Minutes are attached hereto as **Exhibit V**.

102. In other words, once again the Board was kicking the can down the road regarding any declaration amendment that would restrict STRs.

103. As time passes, the Board occasionally mentions the need to work on the issue of rentals and short terms rentals and their limitations to regulate STRs. The **March 28, 2018 Board Minutes**, attached hereto as **Exhibit W**, provide an example of this ongoing conversation:

Short Term Rentals – Dave Hunter

Indicated there are a number of issues that need to be considered in coming up with a short term rentals solution. There needs to be a final determination on what the Board can and cannot do to regulate rental activity, there needs to be an understanding of owner and Association risks in these type activities, an optimal fee schedule needs to be developed that meets the needs of both CFPOA and those renting their homes, and a system of how to handle short term rental complaints needs to be developed.

He thanked owners Melissa Meadows and Jan Nickerson for their outstanding research and suggestions they have provided to the Board on this issue. For example, there is a company named Host Compliance that goes out and uses a series of algorithms to make sure we have identified all short term rental activity taking place in the community.

The Board should have something to present to the community in the near future on the short term rental issue.

104. The Board then explores methods for monitoring the STR activity in Connestee Falls, as referenced in the **June 27, 2018 Board Minutes** attached hereto as **Exhibit X**.

Rentals Update - Short-term rentals have been a continuing issue. We have been exploring what controls can be implemented and ways to monitor. We just finalized an agreement with a company named Host Compliance to help in this regard. (Asheville is using this same company.) We are hoping to go live by August 1 as we have some initial work to download and upload from one system to another. This company monitors up to 50 websites where people do direct marketing and rentals. (They can also send out violation letters on our letterhead and have a 24-7 hotline for owners to register a violation complaint.)

105. And at the 2018 Annual Meeting, STRs are again referenced, not because they are prohibited in Connestee Falls, but because the Association is trying to monitor them and catch violators, presumably owners that do not

register their guests and pay the required rental fees. The **August 4, 2018 Annual Meeting Minutes** are attached hereto as **Exhibit Y**.

106. The Association maintains and maintained Rules and Regulations which facilitate STRs creating a registration form and fees for rentals (“**the 2021 Rules and Regulations**”). The 2021 Rules and Regulations are attached hereto as **Exhibit Z**.

107. The 2021 Rules and Regulations require that lessors submit a “Tenant/Guest Registration Form for Connestee Falls Residence” for each rental term (“**the Rental Registration Form**”). The Rental Registration Form is attached hereto as **Exhibit AA**.

108. Article V.1.C. of the 2021 Rules and Regulations states that the Rental Registration Form must be submitted to the Association for rentals “for any period of time.”

109. Prior to the 2021 Rules and Regulations, and after the Sixth Restatement was adopted by members of the Association in the summer of 2017, the Association adopted Rules and Regulations on March 23, 2018, pursuant to the Fifth Restatement (“**the 2018 Rules and Regulations**”). The 2018 Rules and Regulations are attached hereto as **Exhibit BB**.

110. The 2021 Rules and Regulations and the 2018 Rules and Regulations allow for rentals less than 30 days in length.

111. The 2021 Rules and Regulations and the 2018 Rules and Regulations define “Tenant” consistently with the Fourth, Fifth and Sixth Restatements.

112. Renters for less than 30 days have always been a permitted practice in Connestee Falls under any iteration of the declarations.

113. The Association has taken proactive steps to facilitate rentals of less than 30 days by creating guidelines, forms, welcome packets, charging rental fees, and assisting with check-in service and providing amenity passes for rental guests.

114. Examples of routine interactions between employees of the Association and members of the Association regarding the short term rental of their properties and the Association’s facilitation in that regard are attached hereto as **Exhibit CC**.

115. The 2023 Fee schedule includes the Tenant/Guest Registration Fees “Per month (or any portion thereof)” of \$150 per rental period (“**the 2023 Fee Schedule**”). The 2023 Fee Schedule is attached hereto as **Exhibit DD**.

116. The 2023 Fee Schedule contemplates rentals for less than 30 days.

117. The 2023 Fee Schedule also distinguishes between “guests” and tenants” as under the Fourth, Fifth and Sixth Restatements, a “guest” is someone who stays for less than 30 days and a “tenant’s” stay is 30 days or more.

118. Per the proposed Connestee Falls 2024 budget attached hereto as **Exhibit EE**, the required Tenant Registration Fees results in substantial income to the Association annually.

119. Until the Board's abrupt revelation regarding the Sixth Restatement being unenforceable and reinterpreting the meaning of the Fifth Restatement to ban STRs, rentals for periods of less than 30 days had never been disallowed under the declarations, whether the Original Covenants, Second or the Fourth, Fifth or Sixth Restatement was the controlling declaration.

120. And before the Fourth Restatement, leasing was not meaningfully addressed in the declarations.

121. For example, attached hereto as **Exhibit FF**, is an email July 18, 2019, from the Association to a prospective buyer Lori Nielsen, who ultimately did buy a property in Connestee Falls, responding to her inquiring to Association manager Jim Whitmore whether short term rentals are permitted in Connestee Falls. The answer is yes and she is provided the Rental Registration Form and other information.

122. Another example, attached here as **Exhibit GG**, is an e-mail from perspective buyer Vicki Ford dated May 5, 2021 inquiring as to whether short term rentals are permitted in Connestee Falls. Again, an employee of the association responds that yes, short term rentals are permitted. Ms. Ford and her husband proceeded with the purchase in Connestee Falls.

123. At the 2023 annual Association meeting on August 5, 2023, the General Manager's report, on slide 19, states that the "Rental concerns to be addressed by incoming Board." See the 2023 Annual Meeting presentation attached hereto as **Exhibit HH**.

124. And then, abruptly, the Board issued a statement dated November 7, 2023, and emailed to the community on November 8, 2023, that declared that not only is the Sixth Restatement not the controlling declarations, rather, the Fifth Restatement is controlling, that the Board's attorney has concluded that the Fifth Restatement prohibits rentals for periods less than 30 days ("**the November 7, 2023 Board Statement**"). The November 7, 2023 Board Statement is attached hereto as **Exhibit II**.

125. Doubling down on the November 7, 2023 Board Statement, the Board issued a follow up statement dated November 15, 2023 explaining the process the Board used to reach their conclusion that STRs are prohibited in Connestee Falls ("**the November 15, 2023 Board Email**"). The November 15, 2023 Board Email is attached hereto as **Exhibit JJ**.

126. The Board then issued a FAQ regarding the transition to a prohibition on STRs that provides for a grace period ending on May 31, 2024, after which no STRs may be let in Connestee Falls ("**the STR FAQ**"). The STR FAQ is attached as **Exhibit KK**.

127. It is clear that the Board made the arbitrary decision to ban short term rentals and requested their attorney to back them into that conclusion.

128. The repercussions of the Association's decision to ban STRs is already adversely affecting Plaintiffs as at least one STR platform is removing rental listings based on the Association's decision. See an email regarding the removal of Connestee Falls rental listings from Vacasa, a STR platform attached hereto as **Exhibit LL**.

IV. PETITION FOR WRIT OF MANDAMUS

129. Plaintiffs incorporate by reference as if stated herein all of the allegations in the preceding paragraphs.

130. A writ of mandamus is a court order "to a board, corporation, inferior court, officer or person commanding the performance of a specified official duty imposed by law." *Morningstar Marinas/Eaton Ferry, LLC v. Warren Cnty.*, 368 N.C. 360, 364, 777 S.E.2d 733, 736 (2015) (citation and quotation marks omitted).

131. A court should issue its writ of mandamus when (1) the petitioner has a "clear legal right to the act requested," (2) the respondent has a "legal duty to perform the act," (3) performance of the act is "ministerial in nature and does not involve the exercise of discretion," (4) the respondent "did not perform the act" and "the time for performance has expired," and (5) there is no "alternative, legally adequate remedy" available. *Id.* (citation, quotation marks, and alternations omitted).

132. "A court cannot refuse a petition for writ of mandamus when it is sought to enforce a clearly-established legal right." *Morningstar Marinas v. Warren Cty.*, 233 N.C. App. 23, 27, 755 S.E.2d 75, 78 (2014).

133. N.C.G.S. § 47F-2-117(c) states, "Every amendment to the declaration **shall be recorded** in every county in which any portion of the planned community is located and is effective only upon recordation." (emphasis added).

134. Since Connestee Falls contains more than 20 lots, is primarily residential, and none of its governing documents provide to the contrary, N.C.G.S. § 47F-2-117(c) is retroactively applicable to it. N.C.G.S. § 47F-1-102(c).

135. In accordance with Article XVII of the Fifth Restatement,

This Declaration may be amended at any time **by the affirmative vote of a majority of the valid ballots cast by Voting Members in good standing via a written ballot** ordered for that purpose. Any amendments to the Declaration will become effective upon recordation and the president of the Association shall certify that the required affirmative vote was obtained and the secretary of the Association shall attest to the certification.

(emphasis added).

136. **Per the Board's August 11, 2017 Communication**, the Association communicated to its members that it had consulted with counsel regarding the validity of the vote and confirmed that "recent amendments to the Declaration have been adopted in full compliance with applicable state law." (**Ex. N**)

137. The August 5, 2017, Association Minutes also report that the Sixth Restatement was adopted by a vote of 76%. (**Ex. O**)

138. Since 2017, the Association has posted the Sixth Restatement on its website, representing to members and the public that they were the governing declarations.

139. Since that time, people have purchased and sold property in Connestee Falls in reliance of the Sixth Restatement being the active declarations.

140. As members of the Association, Plaintiffs have the clear legal right to have the Association record the duly passed and authorized Sixth Restatement to the Declaration under N.C.G.S. § 47F-2-117(c).

141. The Association has the legal duty to record the Sixth Restatement. N.C.G.S. § 47F-2-117(c).

142. The Association's recording of the Sixth Restatement is ministerial in nature and not discretionary.

143. The Association failed to perform this act.

144. The Association failed to timely perform this act as evidenced by the fact that it is has already confirmed to the entire community that the Sixth Restatement has "been adopted in full compliance with applicable state law," published the Sixth Restatement on its website to represent it was the governing declaration, and the Association continued to actively assist property owners to rent their properties for less than 30 days.

145. There is no alternative, legally adequate remedy available because the Association cannot simply continue to refuse to record the Sixth Restatement in clear violation of the law and its fiduciary obligations to the Association. *Conleys Creek Ltd. P'ship v. Smoky Mt. Country Club Prop. Owners Ass'n*, 255 N.C. App. 236, 251, 805 S.E.2d 147, 157 (2017) (directors and officers of property owners' association owe a fiduciary duty to the association); accord N.C.G.S. §§ 55-8-30 & 42.

146. Moreover, since 2017 and until recently, the Association has represented to the members and public that the Sixth Restatement was the governing declaration.

147. There is no adequate remedy at law to compensate all of those members and the public persons who bought, did not buy, improved, did not improve, or otherwise dealt with the real estate in the community differently based on that representation.

V. CAUSES OF ACTION

In the Alternative:

a. First Cause of Action Declaratory Judgment

148. Plaintiffs incorporate by reference as if stated herein all of the allegations in the preceding paragraphs.

149. Covenants are to be "strictly construed with all ambiguities resolved in favor of the unrestrained use of land." *E.g. Wein II, LLC v. Porter*, 198 N.C. App. 472, 479, 683 S.E.2d 707, 712 (2009)

150. “[N]othing can be read into a restrictive covenant enlarging its meaning beyond what its language plainly and unmistakably imports.” *Id.*

151. Amendments to Covenants must be in writing. See N.C.G.S. § 47F-2-117(c)&(e) (requiring covenants to be recorded, and thus implying they must be written).

152. An actual and justiciable controversy has arisen and exists between Plaintiffs and Defendants regarding the following:

- a. Whether the Sixth Restatement is the operative Declaration of Restrictive Covenants.
- b. Whether there is an implied contract that makes the Sixth Restatement valid and enforceable.
- c. Whether the Fifth Restatement Article XVIII prohibits rentals of less than 30 days under a strict reading which would resolve all ambiguity in favor of the unrestrained use of land.
- d. Whether the Association violated the Fifth Restatement, Art. XVII by effectively unilaterally amending the declarations by failing to record the Sixth Restatement.
- e. Whether the Association violated the Fifth Restatement, Art. XVII by effectively unilaterally amending the declarations by newly “interpreting” the Fifth Restatement to bar rentals less than 30 days.
- f. Whether the Association violated N.C.G.S. § 47F-2-117(c) in failing to record the Sixth Restatement.
- g. Whether interpreting the Fifth Restatement to prohibit rentals less than 30 days in length is void for being beyond the scope of the original declarations.
- h. Whether the statute of limitations applies to the Association’s attempts to enforce a prohibition of rentals lasting less than 30 days.
- i. Whether the Association’s course of conduct with its policies and practices encouraging STRs, developing and enforcing STR procedures, and charging Plaintiffs substantial fees for hosting STRs serves as a novation / amendment / ratification of the STR policies.
- j. Whether the doctrines of waiver, laches, unclean hands, promissory estoppel, equitable estoppel, and/or quasi-estoppel would apply to bar the Association's attempts to enforce a prohibition of rentals lasting less than 30 days.

153. That Plaintiffs are entitled, pursuant to North Carolina General Statute § 1-253, et seq., and Rule 57 of the North Carolina Rules of Civil Procedure, to a declaratory judgment in favor of Plaintiffs allowing rentals less than 30 days in length under a validly enforceable Sixth Restatement or, alternatively, under the Fifth Restatement.

b. Second Cause of Action
Breach of Contract of the Sixth Restatement

154. Plaintiffs incorporate by reference as if stated herein all of the allegations in the preceding paragraphs.

155. "Covenants accompanying the purchase of real property are contracts which create private incorporeal rights, meaning non-possessory rights held by the seller, a third-party, or a group of people, to use or limit the use of the purchased property." *Wein II, LLC*, 198 N.C. App. at 479, 683 S.E.2d at 712.

156. "Judicial enforcement of a covenant will occur as it would in an action for enforcement of 'any other valid contractual relationship.'" *Id.*

157. The Sixth Restatement is a valid contract to which Plaintiffs and Defendant are parties.

158. The Sixth Restatement only requires a two-day minimum for rentals.

159. The Association's affirmative representations to Association members, including Plaintiffs, that the Sixth Restatement is the governing declaration and its failure to record the Sixth Restatement were breaches of the implied covenant of good faith and fair dealing.

160. In attempting to impose a 30-day minimum for rentals, the Association is in breach of contract.

161. The Association's breach of contract has caused Plaintiffs damage in the amount of lost rent, loss of opportunity to retain renters for the coming year(s), the loss of investments in their properties to convert them to and/or maintain them as STRs, and loss of value of their individual properties in excess of \$25,000.

c. Third Cause of Action

In the alternative to the Second Cause of Action, Breach of Contract of the Fifth Restatement

162. Plaintiffs incorporate by reference as if stated herein all of the allegations in the preceding paragraphs.

163. In the alternative to the Second Cause of Action, the Fifth Restatement is a valid contract to which Plaintiffs and Defendant are parties.

164. A strict reading of the Fifth Restatement resolving all ambiguities in favor of the unrestrained use of land does not support the Association's recently asserted position that the Fifth Restatement requires a 30-day minimum for rentals.

165. The Association's reading of the Fifth Restatement enlarges its meaning beyond what its language plainly and unmistakably imports.

166. Further, the Association's attempt to restrict property based on the length of the rental period under a tortured reading of the Fifth Restatement is a breach of the implied covenant of good faith and fair dealing.

167. The Association's conduct in permitting, enabling, and profiting from STRs in the recent years, as well as the Association's comments that the Fifth Restatement should be amended to clarify that STRs are permitted, and other instances of the parties conduct all evidences the intent of the parties as to the meeting of the minds and their understanding of the Fifth Restatement.

168. In attempting to now restrict property based on the length of a rental period, the Association is in breach of contract.

169. Plaintiffs have incurred substantial expenditures and/or contractual obligations incidental to or as part of the use and maintenance of their properties as short term rentals or rentals for periods less than 30 days (“STRs”).

170. Plaintiffs incurred these expenses prior to the Association’s recent interpretation of the Fifth Restatement (the Association having determined the Sixth Restatement is not applicable) and in reliance on the Association’s prior representations regarding the allowance of STRs.

171. The Association’s breach of contract has caused Plaintiffs damage in the amount of lost rent, loss of opportunity to retain renters for the coming year(s), the loss of investments in their properties to convert them to and/or maintain them as STRs, and loss of value of their individual properties in excess of \$25,000.

d. Fourth Cause of Action
Unjust Enrichment/Quantum Meruit

172. Plaintiffs incorporate by reference as if stated herein all of the allegations in the preceding paragraphs.

173. Plaintiffs conferred a measurable benefit on the Association when it paid the Association’s Tenant/Guest Registration Fees each time Plaintiffs used their properties as STRs.

174. The Association consciously accepted that benefit.

175. The Plaintiffs did not confer that benefit officiously or gratuitously on the Association.

176. In the event that the Fifth Restatement have been and still are the governing amendments, and should it also be found that the Fifth Restatement do prohibit STRs, then the Association has been unjustly enriched in the amount of STR fees it has charged Plaintiffs over the years.

177. Plaintiffs paid these fees to the Association, and thus have been damaged, in an amount in excess of \$25,000.

e. Fifth Cause of Action
Interference with Prospective Contract

178. Plaintiffs incorporate by reference as if stated herein all of the allegations in the preceding paragraphs.

179. This tort arises when a party interferes with a business relationship "by maliciously inducing a person not to enter into a contract with a third person, which he would have entered into but for the interference, . . . if damage proximately ensues, when this interference is done not in the legitimate exercise of the interfering person's rights." *Spartan Equip. Co. v. Air Placement Equip. Co.*, 263 N.C. 549, 559, 140 S.E.2d 3, 11 (1965) (citations omitted).

180. "[A] defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which

he intends to be prejudicial or injurious to another." *Wilcox v. City of Asheville*, 222 N.C. App. 285, 289, 730 S.E.2d 226, 230 (2012).

181. "...[T]he intention to inflict injury may be constructive as well as actual." *Id.* "...[W]anton and reckless behavior may be equated with an intentional act..."

182. Here, the Association had a clear duty to record the Sixth Restatement according to statute.

183. The Association "consulted with counsel" about the validity of the Sixth Restatement, and yet still failed to record them.

184. Further, the Association has always operated as though there are no restrictions on STRs, even creating a method and bureaucracy to facilitate these rentals.

185. The Association knew that many property owners had made substantial investments in their properties in reliance on the Association's representations that STRs are permitted.

186. The Association has now completely changed course and declared that the Sixth Restatement is not enforceable, even though it was adopted in 2017 and been used at the Association's functioning declarations until recently when the Association twisted itself in legal knots to conclude the Fifth Restatement is still valid and, contrary to the Association's earlier assertions, that the Fifth Restatement prohibits rentals less than 30 days.

187. The Association's action was arbitrary and capricious, in that it changed its policy to appease the loudest voices now opposing STRs.

188. This is at least constructive malice, as the Association has announced this categorical change in its STR policy based on the pressures of those who oppose STRs.

189. This conduct also constitutes constructive malice in that it is a wonton and reckless failure to record the Sixth Restatement, which it was clearly obligated to do by statute, and after with the Association's legal counsel advised them that the Sixth Restatement was valid.

190. This conduct is prejudicial and injurious and does not arise out of a legitimate exercise of the interference with the STR owners' rights.

191. The Association's recent policy with regard to STRs has induced Plaintiffs not to enter into prospective contracts with third party renters beyond the deadline the Association has set for its prior STR policy to expire.

192. The Association's conduct has proximately caused damages to Plaintiffs in terms of lost rent in excess of \$25,000.

f. Sixth Cause of Action
Negligent Misrepresentation

193. Plaintiffs incorporate by reference as if stated herein all of the allegations in the preceding paragraphs.

194. "The tort of negligent misrepresentation occurs when (1) a party justifiably relies, (2) to his detriment, (3) on information prepared without reasonable care, (4) by one who owed the relying party a duty of care." *Brinkman*

v. Barrett Kays & Assocs., P.A., 155 N.C. App. 738, 742, 575 S.E.2d 40, 43-44 (2003).

195. Plaintiffs justifiably relied on the Association's misrepresentations that the Sixth Restatement was the operative set of declarations.

196. Those misrepresentations included, but are not limited to, the Association's communications to Association members that the Sixth Restatement was the lawfully adopted declarations, the Association's posting the Sixth Restatement on its website, the Association's active assistance to members in leasing properties as STRs for less than 30 days.

197. Plaintiffs justifiably relied on the Association's misrepresentations. Some Plaintiffs purchased property based on these misrepresentations. Others improved their properties based on these misrepresentations. The Association's new position on STRs means these Plaintiffs will not see the return on these investments.

198. Further, Plaintiffs paid the Association a fee of \$150 per STR renter in reliance on the Association's representation that it would allow STRs.

199. The Association published its misrepresentations that the Sixth Restatement was valid without reasonable care. The Association knew or should have known that it needed to record the Sixth Restatement for them to be valid. This was a statutorily required duty of the Association. The Association, however, failed to do so.

200. The Association published misrepresentations to Plaintiffs that it had done its legal due diligence to confirm the legal validity of the Sixth Restatement.

201. The Association misrepresented that STRs are not allowed under the Fifth Restatement when, in fact, they are.

202. The Association owed the Association members a duty of care to discharge its duties in good faith. *Adum v. Albemarle Plantation Prop. Owners Ass'n*, 2021 NCBC 4, 70 ("...the Board is not obligated to act only, or even primarily, in the best interests of vacant lot owners. Rather, the Board owes its duties to the [property owners association] **and all of its members.**") (emphasis added).

203. The Association's misrepresentations proximately caused Plaintiffs damages in excess of \$25,000 in the form of investments in properties that they were assured could be used as STRs, the updates and improvements made to those properties based on the Association's misrepresentations, and/or in the form of STR fees Plaintiffs paid to the Association in reliance on the Association's misrepresentations.

**g. Seventh Cause of Action
Negligence**

204. Plaintiffs incorporate by reference as if stated herein all of the allegations in the preceding paragraphs.

205. The Association owed the Association members a duty of care to discharge its duties in good faith. *Adum*, 2021 NCBC at *70 ("...the Board is not

obligated to act only, or even primarily, in the best interests of vacant lot owners. Rather, the Board owes its duties to the [property owners association] and **all of its members.**") (emphasis added).

206. The Association owed the Association members a duty to record the Sixth Restatement under N.C.G.S. § 47F-2-117(c).

207. The Association breached its duties to the Association members by failing to record the Sixth Restatement and attempting to enforce its new interpretation of the Fifth Restatement that would disallow STRs.

208. The Association's negligence has proximately caused Plaintiffs damages in excess of \$25,000 in terms of their investments in their properties in reliance on the Sixth Restatement, the updates and improvements made to those properties based on the Association's misrepresentations, and in terms of the contracts and potential contracts for rentals on their properties.

h. Eighth Cause of Action
Unfair and Deceptive Trade Practices (Chapter 75)

209. Plaintiffs incorporate by reference as if stated herein all of the allegations in the preceding paragraphs.

210. The Association committed unfair and deceptive acts or practices including, but not limited to, the following:

- a. Failing to record the Sixth Restatement in violation of North Carolina law (N.C.G.S. § 47F-2-117(c)).
- b. Misrepresenting to members that it had taken sufficient action to make the Sixth Restatement legally enforceable.
- c. Publishing numerous other misrepresentations to members and the public that the Sixth Restatement was the governing declaration.
- d. Misrepresenting to members that STRs are barred under the Fifth Restatement when, in fact, they are not.
- e. In the event that the Fifth Restatement is the operative one and prohibits STRs, the Association's conducting in charging and collecting a rental fee from Plaintiffs in order to allow Plaintiffs to rent their properties as STRs contrary to the prohibition in the Fifth Restatement.

211. The Association's above conduct was intended to deceive or, at a minimum, had the capacity or tendency to deceive.

212. The Association's above conduct and misrepresentations were made to the public, including potential and actual real estate investors, Realtors, short-term rental businesses, and home buyers.

213. The Association's above conduct affected the business activities of Plaintiffs in causing them to make business decisions concerning investments in their properties as short term rentals.

214. The Association's above conduct was thus in or affecting commerce.

215. The Association's above conduct offends established public policy, is immoral, oppressive, unscrupulous, or substantially injurious to consumers.

216. The Association's above conduct was intentional, willful, wanton, and fraudulent.

217. The Association's above conduct proximately caused damages in excess of \$25,000 to Plaintiffs.

VI. MOTION FOR PRELIMINARY INJUNCTION

218. Plaintiffs incorporate by reference as if stated herein all of the allegations in the preceding paragraphs.

219. A preliminary injunction will issue "(1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *Cabrera v. Harvest St. Holdings, Inc.*, 284 N.C. App. 227, 236, 876 S.E.2d 593, 599 (2022) (quotation omitted).

220. As is outlined above, Plaintiffs have a high likelihood of success on the merits on one or more of their legal claims. Most of Plaintiffs' claims are based on uncontested facts, such as the fact that the Sixth Restatement was duly approved by the members, but the Association did not record it in accordance with its statutory obligation to do so.

221. Plaintiffs' case is also largely supported by documents generated and/or published by the Association itself.

222. Next, Plaintiffs will suffer irreparable loss unless the injunction is issued.

223. For example, Plaintiffs and other similarly situated property owners typically schedule the vacation rentals of their properties well in advance of the actual rental.

224. Some Plaintiffs began booking properties for rent well into 2024 before the Association announced its new interpretation of the declarations with regard to STRs. Those reservations are also scheduled to occur after the Association's date for the beginning of its enforcement of its new rules with regard to STRs.

225. One or more of Plaintiffs have canceled bookings due to the Association's announcement with regard to STRs.

226. One or more of Plaintiffs have stopped bookings past the Association's enforcement date and are losing, and will continue to lose, bookings and potential rental income for 2024.

227. Moreover, rental income is critical for Plaintiffs to maintain the good repair of their properties on an ongoing basis. Based on representations from the Association, one or more of the property owners in Connestee Falls rely on rental income to meet their financial obligations - and specifically to pay their mortgages. The abrupt loss of income could cause such owners to fall into default and face foreclosure. Depending on the length of the litigation, other owners may be forced to sell their properties, entirely negating the remedy they seek.

228. Plaintiffs and other members of the community will suffer if owners are forced to sell their properties pending the litigation, resulting in increased supply, lower property values, and lower demand for properties in a vacation area that have vacation-oriented restriction.

229. Plaintiffs and other members of the Association will also suffer if numerous properties in Connestee Falls are in foreclosure.

230. Any Plaintiffs defaulting will suffer irreparable harm if they are forced to default on their mortgages in the form of poor credit which will affect their ability to access capital for other investments or personal matters.

231. Further, new buyers from outside of the community are unlikely to purchase properties in a community with ongoing litigation, further depressing home values.

232. Should STRs be prohibited, this will dramatically decrease the Association's revenue which, in turn, will have to be made up from additional contributions from property owners including Plaintiffs.

233. On the other hand, the Association does not risk any perceptible damage if short-term rentals continue in accordance with the status quo.

234. Plaintiffs have and will continue to suffer immediate and irreparable injury, loss, or damage unless the Court enjoins the Association's enforcement of its new STR rules.

235. Entering such an injunctive order maintains the status quo and does not cause any injury to the Association or the community.

236. The equities favor Plaintiffs in the entering of this injunction.

237. Based on the above and as will be further shown in a memorandum submitted in support of this motion and the accompanying affidavit(s), Plaintiffs can demonstrate a high likelihood of success on the merits of one or more of their claims.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that the Court:

1. Issue its writ of mandamus and mandate that the Association immediately record the Sixth Restatement.

2. In the alternative, for a preliminary injunction pending the outcome of this action which would prohibit the Association from enacting, enforcing, attempting to enforce, or threatening to enforce new policies, rules, or regulations regarding STRs that are different than the status quo.

3. For a Declaratory Judgment finding that:

- a. The Sixth Restatement is the operative Declaration of Restrictive Covenants.
- b. there is an implied contract on the terms of the Sixth Restatement;
- c. the Fifth Restatement does not prohibit STRs;
- d. the Association violated the Fifth Restatement by unilaterally amending or attempting to amend the declarations;
- e. the Association violated N.C.G.S. § 47F-2-117C(c) by failing to record the Sixth Restatement;

- f. any prohibition in the Fifth Restatement on STRs is void as beyond the scope of the original declarations;
 - g. the statute of limitations prevents any attempt by the Association to prohibit STRs;
 - h. Whether the Association's course of conduct with its policies and practices encouraging STRs, developing and enforcing STR procedures, and charging Plaintiffs substantial fees for hosting STRs serves as a novation / amendment / ratification of the STR policies; and/or
 - i. the doctrines of waiver, laches, unclean hands, promissory estoppel, equitable estoppel, and/or quasi-estoppel bars the Association's attempts to enforce a prohibition of STRs.
4. For actual, economic, and consequential damages resulting from Plaintiffs' tort and contract claims.
 5. For actual, economic, and consequential damages, treble damages, and attorney's fees in accordance with Chapter 75 of the North Carolina General Statutes.
 6. For costs, expenses, and attorney's fees otherwise permitted.
 7. For any other relief that the Court deems just.
- This the 21st day of February, 2024.

VAN WINKLE, BUCK, WALL,
STARNES & DAVIS, P.A.



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VERIFICATION

STATE OF Florida

COUNTY OF Duval

That the undersigned, Chris Margolin, being first duly sworn, deposes and says: That he is one of the Plaintiffs in the foregoing action; as such he has read the foregoing Complaint and knows the contents thereof and that the same are true of his own knowledge.

THIS, the 16th day of February, 2024.

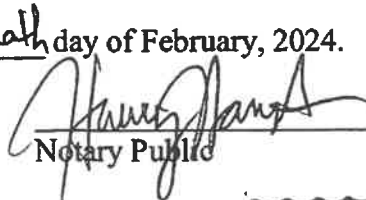

CHRIS MARGOLIN

STATE OF Florida

COUNTY OF Duval

I certify that the following person(s) personally appeared before me this day, each acknowledging to me that he voluntarily signed the foregoing document for the purpose stated therein and in the capacity indicated.

Sworn to and subscribed before me, this 16th day of February, 2024.


Notary Public

My Commission Expires: 10/23/2026

